

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B109

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DEREK MAYNES,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
AURARIA HIGHER EDUCATION CENTER,
DIVISION OF FACILITIES MANAGEMENT,

Respondent.

Hearing in this matter was held on May 9, 10 and 11, 1995, in Denver before Margot W. Jones, administrative law judge. Respondent appeared at hearing through Elizabeth Weishaupl, assistant attorney general. Complainant, Derek Maynes, was present at the hearing and represented by John Mosby, attorney at law.

Respondent called the following employees of the Department of Higher Education, Auraria Higher Education Center (AHEC), to testify at hearing: Derek Maynes, the complainant; Sharon Archer; William Tremble; Darrell Ballinger; Jim Fasano; Julie Hughes; Gary Glas; Jim Kelley; and Mansour Shamsabadi.

Complainant testified in his own behalf and called the following AHEC employees to testify at hearing: Lee Ann Gernome; Randall Evans; Vernon Paiz; Alfredo Abad; Louise Chavez; Diane Sutter; Thomas Moody; Terrence Kays; Dennis Zewie; Dale Buckler; D. Campbell; John Padilla; and Pete Hagan.

Respondent's exhibits 2 through 4, 6 through 17, 21, 21a, 23, 24 and 26 were admitted into evidence without objection. Respondent's exhibits 5 and 20 were admitted into evidence over objection.

Complainant's exhibits M, T, and U were admitted into evidence without objection. Complainant's exhibits H, I, P, and Q were admitted into evidence over objection.

MATTER APPEALED

Complainant appeals his disciplinary demotion and transfer.

ISSUES

95B109

1. Whether complainant did the acts for which discipline was imposed.
2. Whether complainant's actions constituted wilful misconduct, disrespect, continual harassment and physical threats.
3. Whether the decision to demote complainant was arbitrary, capricious or contrary to rule or law.
4. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. Complainant's request to sequester the witnesses from the hearing room was granted. The witnesses were excluded from the hearing room and ordered not to discuss their testimony until advised that the hearing was concluded.
2. Complainant's April 28, 1995, motion to supplement amended prehearing statement was denied. Complainant attempted to raise, through the April 28 motion, claims which were distinct from the matters raised in this appeal and which were claims that should be grieved.

FINDINGS OF FACT

1. At all time relevant to this appeal, Complainant Derek Maynes was employed by AHEC, in the facilities management (FAC-MAN) division. Maynes began his employment with AHEC in 1985 in the grounds department where he mowed lawns. Maynes moved into the shop area at FAC-MAN at sometime prior to 1987.
2. The shop area is a part of FAC-MAN where trade shops are located which serve the AHEC campus. Among the trade shops in this area are the paint, the locksmith, electrical, heating and air conditioning, welding, general maintenance and carpentry.
3. Maynes worked in the sign painting shop and, in 1987, he transferred to the locksmith shop. Here he worked under the supervision of Sharon Archer, lead worker and locksmith. Maynes was classified as a plant maintenance mechanic II.
4. In 1993 and 1994, Archer was supervised by Darrell Ballinger, general maintenance supervisor. Ballinger was supervised by James Fasano, AHEC facilities manager. Fasano was supervised by Jim Kelley, the director of the division of facilities management.
5. The locksmith and her assistant, Maynes, were responsible for maintaining, installing and repairing locks on AHEC's campus.

95B109

There are 10,000 door and locks on the campus.

6. During Maynes' employment at AHEC, he was known by co-workers at FAC-MAN and campus personnel to be congenial, competent and hardworking. Co-workers in the shop area enjoyed working with him on assignments. Campus personnel who received his services found him to be an exceptional worker.

7. Maynes received job performance ratings covering the period from August, 1988, through October, 1994. Each year, from 1988 through October 1993, Maynes received ratings of "above standard", "commendable" and "outstanding". For the performance rating period from November, 1993, through October, 1994, Maynes received a performance rating of "needs improvement".

8. Archer is the only female employee currently in the FAC-MAN shop area. The shop area primarily employs male employees. Archer exerts extra effort to get along with her co-workers. Despite her efforts, she is known as a stickler for rules. She is known to be inflexible in the performance of her job duties.

9. Maynes and Archer used profanity in general conversation with co-workers and each other. The use of profanity is the norm among the line workers at FAC-MAN. Supervisory personnel are not known to use profanity in addressing their subordinates. The use of profanity to express anger is not the norm when employees address supervisors or co-workers. Prior to December, 1993, Ballinger asked Maynes and Archer to curb their use of profanity in the work place because Ballinger believed their use of profanity was excessive.

10. From 1987 to December, 1993, while Maynes was assigned to the lock shop, he and Archer were very good friends and compatible co-workers. Archer was friends with Maynes' wife and children.

11. Beginning in December, 1993, and continuing to May, 1994, Archer and Maynes stopped getting along. Maynes exhibited hostility toward Archer. He refused to take direction from her. Repeatedly, during this period, when Archer assigned duties to him, his response to her was, "Fuck you, you're not my boss!".

12. On another occasion, in December, 1993, Maynes told Archer that she is not his "ma ma chee chee". Maynes intended to indicate that Archer should not give him direction because she is not his mother. However, Archer believed that Maynes was making reference to her breast. Archer threatened Maynes that his remark constituted sexual harassment. Maynes never made the remark again.

13. In December, 1993, Maynes was angered by the smell of paint fumes and repeatedly slammed a door. Maynes slammed the door saying, "Fuck it!". Archer warned Maynes to stop slamming the

95B109

door because he might disturb a management meeting being held in the lunchroom area nearby. Maynes was unconcerned and continued to slam the door and use profanity

14. In December, 1993, Archer assigned Maynes to repair doors at the child care center on campus. The job should have taken two and one half hours. Maynes spent 4 hours working on the doors.

15. As early as December, 1993, Archer began to report her interactions with Maynes to her supervisor, Darrell Ballinger. Ballinger knew Maynes and Archer to be very good friends. Initially, he was not aware of the degree of tension between Maynes and Archer.

16. Ballinger met with Archer and Maynes in December, 1993, to discuss their problems. Maynes called Archer a mother hen and Archer accused Maynes of refusing to take direction from her. Ballinger asked them both to keep notes of their interaction, recording each incident which they wanted Ballinger to be aware of.

17. Maynes refused to keep notes about Archer's behavior. Maynes told Ballinger that he was not a snitch. Archer agreed to keep notes about the problems that she was having with Maynes.

18. In January, 1994, Archer directed Maynes to repair security doors which were not properly latching. Maynes decided that the door locks were not malfunctioning and he assigned a carpenter to repair the door. Maynes told Archer the doors were not repairable.

19. Archer asked Maynes to come along with her to repair the doors which he described as not repairable. Archer cautioned Maynes not to pass off a job assigned to him as an emergency to another shop. In response to this direction, Maynes flew off the handle and yelled profanity at Archer.

20. During this incident, Archer told Maynes that he knows lawn mowers and she knows locks. Archer intended to make the point that Maynes should take direction from her because she has knowledge of locks. Maynes heard this statement as a racial slur. Maynes was infuriated by this remark.

21. Maynes threatened Archer with physical violence. Archer responded by inviting his attack. Maynes told Archer she was not worth it. Presumably, she was not worth all the trouble which he would incur if he attacked her.

22. Archer reported to Ballinger that Maynes threatened her. Ballinger began to fear for Archer's safety. Several weeks later, Archer reported this incident to the campus police.

23. In February, 1994, an AHEC painter, Gary Glas, came to the

95B109

shop early one morning. He asked Maynes, who was there alone, for a set of loaner keys to be used during the work day to access areas at AHEC where he needed to work. Glas left his keys at home. It had been the practice in the lock shop to maintain a set of loaner keys in the lock shop for workers to borrow.

24. Maynes explained to Glas that he needed to make a set of loaner keys and he would have to record the numbers on each key. Glas became frustrated and decided to return home to get his own keys. He believed that Maynes was stalling and did not want to provide him with the loaner keys.

25. In February, 1994, paint fumes were emitting from the paint shop and the odor bothered Maynes. He went to the door of the paint shop. Mansour Shamsabadi was in the paint shop working. Maynes yelled at Shamsabadi to "shut the fucking door". Shamsabadi felt no personal affront by the incident.

26. In February, 1994, Maynes also ordered key blanks without Archer's approval. In doing so, he used the wrong forms which would have resulted in incorrect accounting. Archer asked Maynes about ordering the key blanks without her approval and using the improper forms. Maynes told Archer that he "runs his own program".

27. In May, 1994, Archer attempted to ask Maynes to prioritize his work to accomplish assignments that were security related first. Maynes refused to take direction from Archer and he left work early without authorization.

28. On May 4, 1994, Archer and Ballinger asked Maynes to repair the tramway doors. He did not make the repair. Archer told Ballinger that she would do the work herself since the tramway doors are security doors and cannot be left in disrepair. Ballinger insisted that Archer require Maynes to repair the tramway doors.

29. Later, on May 4, Archer saw Maynes on the campus. She was in a maintenance cart with her tool box on board when she encountered him. Maynes called across a distance to Archer that he would "fix the fucking doors", referring to the tramway doors. Archer did not hear Maynes clearly the first time he spoke. She asked him to repeat what he said. He called to her again repeating his earlier remark.

30. Archer reminded Maynes that the tramway doors are a priority because they are security doors. Maynes told Archer that he repaired the doors for two hours the day before and the doors are too difficult to repair. Maynes told Archer that the tramway doors are journeyman level work.

95B109

31. During the same incident, Maynes told Archer that he would take a tool from her tool box on the maintenance cart and again attempt to repair the tramway doors. Archer refused to loan Maynes a tool. Maynes had previously requested the purchase of a separate tool box for him. Archer told Maynes that he had requested the separate tool box so he should return to the shop and get his tool box. A conflict ensued at the tool box with Archer closing the tool box and Maynes forcefully opening the tool box.

32. Archer was intimidated by the public conflict and she rushed to a manager's office to report the incident. At the manager's office, she found Tremble, Ballinger and Fasano together and she reported the incident to them.

33. Ballinger had received the notes kept by Archer about her problems with Maynes. He shared this information with the managers.

34. The managers resolved that Maynes' escalating behavior should be addressed in an interim job performance evaluation. Ballinger presented the interim performance evaluation to Maynes on May 5, 1994. Maynes became angry and told Ballinger that he did not need this "bullshit". Maynes told Ballinger that his job performance during the preceding nine years at AHEC would speak for his ability.

35. At the May 5, 1994, meeting with Maynes, Ballinger was planning to present Maynes with a performance evaluation which reflected that Maynes was in need of improving all areas of his job performance. Maynes refused to discuss the evaluation, and the meeting was concluded. Ballinger prepared a performance documentation. The performance documentation noted that Maynes failed to repair the tramway doors and that he became abusive when presented with the interim performance rating.

36. On May 5 and 6, 1994, Maynes teased Archer in the lunchroom area, making baby noises and calling her a snitch, in the presence of co-workers.

37. On May 16, 1994, Fasano initiated action pursuant to State Personnel Board Rule, Chapter 8, to consider whether disciplinary action should be imposed. Disciplinary action was imposed, appealed to the State Personnel Board and overturned. It was determined that Maynes was denied due process in the conduct of the R8-3-3 meeting. The matter was remanded to the agency for another R8-3-3 meeting.

38. Jim Kelley, Fasano's supervisor, was delegated appointing authority to conduct a second R8-3-3 meeting. Kelley spoke with Archer and Fasano to obtain information about the incidents from

95B109

December, 1993, to May, 1994. Kelley held the R8-3-3 meeting with Maynes and his attorney on December 21, 1994. Kelley invited Maynes to provide him with the names of any co-workers or other persons with knowledge of the incidents. Kelley promised to speak to these people.

39. On December 22, 1994, the day following the R8-3-3 meeting, Maynes provided Kelley with the names of fifteen co-workers that he wanted Kelley to contact about the incidents and/or his job performance. Kelley did not speak to any of the individuals identified by Maynes.

40. On February 2, 1995, Kelley imposed on Maynes a disciplinary demotion and transferred Maynes out of the lock shop, effective February 6, 1995. Kelley advised Maynes that the disciplinary demotion was imposed for wilful misconduct, disrespect, continual harassment and physical threats toward Archer. Maynes was demoted from Grade 69, Step 6 to Grade 69, step 1.

41. The letter notifying Maynes of the disciplinary demotion advised Maynes of the specific incidents which caused Kelley to impose the discipline. Kelley relied on Archer's notes in preparing the disciplinary letter. Archer's notes did not accurately reflect the dates on which some of the incidents occurred, consequently, neither does Kelley's letter.

42. In reaching the decision to demote Maynes, Kelley considered Maynes' employment record, which was unblemished prior to December, 1993. Kelley also considered the information provided to him by Fasano, who was the appointing authority when the first disciplinary action was imposed. Fasano told Kelley that during the first disciplinary proceeding Maynes admitted that he had "stepped over the line" with Archer. Maynes admitted to addressing Archer with profanity and refusing to accept her authority.

DISCUSSION

In this disciplinary proceeding, the burden is on the agency to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the imposition of the discipline. Kinchen v. Department of Institutions, 866 P.2d 700 (Colo. 1994).

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). The State Personnel Board may reverse or modify Respondent's action only if it is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. (1988 Repl.

95B109

Vol. 10B).

Respondent argues that it sustained its burden to establish that complainant engaged in the conduct alleged, that discipline was warranted and that the decision to demote and transfer complainant was not arbitrary and capricious.

Complainant argues that respondent failed to sustain its burden of proof and that the discipline imposed should be overturned. Complainant asserts that Archer was abusive and aggressive toward him. Complainant maintained that his actions were a justified response and do not warrant discipline. Complainant further asserts that Archer has exaggerated and lied about some of the incidents.

Based on complainant's testimony, it was established that on repeated occasions in December, 1993, through May, 1994, complainant used profanity to address Archer in response to her direction to perform his job duties. It was further established that in May, 1994, complainant used profanity in addressing his first line supervisor Ballinger and that complainant refused to take direction from Archer and Ballinger. This evidence alone provides grounds to conclude that complainant engaged in wilful misconduct, disrespect and harassment, and provides sufficient basis to demote and transfer complainant.

It is less clear whether respondent sustained its burden regarding the incidents involving Shamsabadi or whether complainant slammed the door in Archer's face at the daycare center as it is alleged in the February 2 letter.

Shamsabadi testified that he was not bothered by complainant's language when he slammed the paint shop door. He testified that he did not believe that complainant was directing any animosity toward him personally.

With regard to the incident at the daycare center, the evidence established that complainant took four hours to do a job which should have taken two and one half hours. The evidence did not establish that complainant slammed the door in Archer's face. Complainant testified that he was unaware Archer was on the other side of the door. The door area was described as being a solid core door with a panel of mirrored glass along the side which allowed Archer to see complainant, yet complainant could not see Archer.

Respondent failed to establish some of the incidents described in the February 2 letter. The incident described in the letter, numbered "Incident No. 5", was described by Kelley, the author of the letter, as a mistake because it references an incident which was referenced earlier in the letter at "Incident No. 2". As

95B109

previously mentioned, the incident referenced in "Incident No. 5", respondent failed to prove that complainant slammed the door in the work leader's face. Finally, "Incident No. 8", referenced in the February 2 letter, was not proven.

This case arises from a long term friendship between two co-workers, complainant and Archer. It is difficult to understand how their relationship went so far awry.

Respondent has requested an award of attorney fees and costs pursuant to section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act. In order to assess attorney fees against complainant, the administrative law judge must find that complainant's appeal "was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." Id.

There was no evidence presented at hearing that established that complainant's appeal was instituted frivolously, in bad faith or maliciously, as a means of harassment or was otherwise groundless. Thus, respondent is not entitled to an award of attorney fees and cost.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed related to his refusal to do assigned work and his use of profanity in addressing his supervisors. This conduct constitutes wilful misconduct, disrespect and harassment.
2. Respondent failed to sustain its burden to establish that complainant engaged in the incidents referenced in the February 2, 1995, letter of demotion regarding complainant's alleged action of slamming the door in Archer's face, calling Archer "ma ma chee chee" on December 9, 1993, or repeatedly using profanity at Shamsabadi.
3. Respondent's action was not arbitrary, capricious or contrary to rule or law.
4. The discipline imposed was within the range of alternatives available to the appointing authority. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1.
5. Respondent is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed with regard to complainant's use of profanity and his failure to perform assigned work. The

95B109

February 2, 1995, letter demoting complainant should be revised to reflect these findings or the initial decision of the administrative law judge should be attached to the February 2, 1995, disciplinary letter and maintained by respondent in complainant's official personnel file. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
June, 1995, at
Denver, CO

Margot W. Jones
Administrative Law Judge

95B109

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$2218.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

95B109

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____ day of June, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

John Mosby
Attorney at Law
730 17th Street, #750
Denver, CO 80202

and in the interagency mail, addressed as follows:

Elizabeth A. Weishaupl
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203

95B109